MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Proceeding in admiralty appellant sought to recover damages for personal injuries received while he was employed by respondent and engaged in repairing the steamer "Starmount." Upon motion the trial court dismissed the libel, holding that it had no jurisdiction of the cause.

The libel alleges that respondent had charge of the work of repairing the shell plates of the steamer, then resting in a floating dock at Twenty-seventh Street, Brooklyn; that while employed by respondent and working on board appellant suffered injuries through the explosion of a blau torch which the employer negligently permitted to be out of repair. The prayer was for monition according to the course and practice in admiralty and for damages.

Since the decree below (June 14, 1921) we have decided *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479. The opinion there controls this cause unless the injuries sustained by appellant were not the result of tort, committed and effective, on navigable waters. In *The Robert W. Parsons*, 191 U. S. 17, 33, this Court held that repairs to a vessel while in an ordinary dry dock were not made on land. *The Steamship Jefferson*, 215 U. S. 130. Here repairs were made upon the ship while supported by a structure floating on navigable waters. Clearly, the accident did not occur upon land. The doctrine followed in *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625, 627, that "no structure that is not a ship or vessel is a subject of salvage," has no application. That admiralty jurisdiction in tort matters depends upon locality is settled.

The judgment below must be reversed.

GONSALVES *v.* MORSE DRY DOCK & REPAIR COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 8. Argued October 6, 1924.—Decided November 17, 1924.

An action by an employee for personal injuries attributable to his employer's negligence and suffered while the employee was engaged on repairs of a vessel then resting in a dock floating on navigable waters, is within the jurisdiction of the District Court in Admiralty. Reversed.

APPEAL from a decree of the District Court dismissing a libel in admiralty for want of jurisdiction.

Mr. Joseph Larocque for appellant.

Mr. Charles J. McDermott, with whom *Mr. Arthur E. Goddard* and *Mr. Henry C. Hunter* were on the brief, for appellee.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924

No. [redacted]

FRANK GONSALVES, APPELLANT,

vs.

MORSE DRY DOCK & REPAIR COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED JULY 11, 1924.

(28,576)

(28,373)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 418.

FRANK GONSALVES, APPELLANT,

vs.

MORSE DRY DOCK & REPAIR COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1921.

1 United States District Court for the Eastern District of New York.

In Admiralty.

FRANK GONSALVES, Libellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent.

To the Honorable, The Judges of the District Court of the United States for the Eastern District of New York:

The libel of Frank Gonsalves, a ship fitter by occupation, residing at 193 Eighteenth St., Brooklyn, N. Y., in a cause of tort, civil and martime, against Morse Dry Dock & Repair Co., a corporation existing under the laws of the State of New York, as libellant is informed and believes, alleges as follows:

1st. That libellant is a citizen of the United States, and on or about the 22nd day of February, 1916, was in the employ of the above named respondent, Morse Dry Dock & Repair Company as a ship fitter. That the said respondent had charge of the work of repairing the shell plates of the steamship "Starmount," which was then in the floating dry-dock of the Shewan Company at the foot of 27th Street, Brooklyn, N. Y. That libellant was working for the respondent on board the said steamship in the work of making said repairs.

2nd. That in the work of making said repairs, the respondent furnished to, and entrusted for use by, certain of its other employees, certain blau torches, which, as libellant is informed and believes, necessitated and required the use of three tanks or containers, one holding oxygen gas under heavy pressure, and another holding another gas, the real name of which is unknown to libellant, but which was commonly known as blau gas, under a much heavier pressure, and a third or mixing tank. That, in the operation of said blau torches, as libellant is informed and believes, it was necessary: 1st—To allow the gas from the second container, which was under very heavy pressure, to be admitted into the third or mixing tank, which was fitted with a gauge, registering as high as 300 pounds pressure, but which tank, as libellant is informed and believes, was constructed to withstand only a pressure of 80 lbs. per sq. in.; that from this tank the gas was fed to the torch at the point where the heating or burning was to be done, the oxygen gas also being fed from its tank to the point of the burner in a separate feed, so as to form a concentrated, driving flame, which could be used both for heating and cutting purposes.

3rd. That, as libellant is informed and believes, the gauges on the said mixing tank so furnished by respondent, were in a defective and dangerous condition, in that, the safety blow-off, or valve, attached to such tank or gauge and which would, if in proper condition, warn the person using the said apparatus when the pressure in the mixing tank had reached the maximum, and danger, pressure of 80 lbs. therein, was plugged, clogged, and out of order, preventing its free use and destroying its efficiency as a safety blow-
2 off, or valve, all of which was known to respondent, or by the exercise of ordinary care and inspection on its part, could and should have been known.

4th. That, as libellant is informed and believes, the respondent failed and neglected to properly inspect said apparatus, and particularly said gauge and safety valve, and entrusted it for use, to a man, one William Bell, who was unfamiliar with the use and preparation of that particular form of gas or apparatus, and negligently failed to properly instruct him in the use and handling of the same, or to warn him of the danger of allowing the pressure in said mixing tank to exceed 80 lbs., or to inspect or see to it that said tank, gauge, and its accessories, and particularly said safety valve, were in good and proper working order, and that said apparatus was in a proper and safe condition for the uses to which it was about to be put.

5th. That, as your libellant is informed and believes, by reason of the defective condition of said apparatus, and the failure of the respondent, to properly inspect the same and to see to it that said apparatus was in a proper and safe condition for use, and to properly instruct and warn the said Bell in such use, and of the danger of allowing said pressure in said mixing tank or chamber, to exceed 80 lbs., and the failure to provide and maintain a safe and proper safety valve and maintain the same in good and proper repair and condition, the said tank and apparatus became overcharged and suddenly exploded, and your libellant was severely, dangerously and permanently burned and injured about the hands, arms, shoulders, face, neck, ears, and head by the burning gas from such explosion.

6th. That the said form of blow torches, tanks and methods so used by the respondent, were, as libellant is informed and believes, obsolete and improper, unsuitable and dangerous in use, for the purposes for which they were employed by respondent; that simpler and safer means and methods and gases were in common use elsewhere in yards and work such as that of respondent, all of which was known to the respondent, or by the exercise of ordinary care and diligence on its part, could have been ascertained.

7th. Libellant is further informed and believes that the gas used by the respondent in connection with the said apparatus and torches was of an extremely high, explosive and dangerous character, as was well known to the respondent.

8th. That the respondent, Morse Dry Dock & Repair Company, was at all the times referred to and now is within the City of New York and the jurisdiction of this Honorable Court.

9th. That by reason of the burns and injuries received by the libellant, as aforesaid, through the negligence and wrong doing of the respondent, his face, head, ears, neck, hands, arms and shoulders were injured, and disfigured, and from said injuries and their results, libellant has suffered and still suffers great pain and distress, both bodily and mental and was and is permanently disabled and has suffered a loss in wages and in expenses for medical care and attendance, and has been damaged in the sum of Twenty-five Thousand ($25,000.) Dollars, which sum by reason of the premises, libellant claims to be entitled to recover from the respondent herein.

3 10th. Libellant further alleges, for the information of this Honorable Court, that shortly after the occurrences hereinbefore recited, libellant was awarded, under the then existing provisions of the New York State Compensation Law, compensation by the Industrial Commission of the State of New York at the rate of $13.46 per week, which compensation was paid to him up to the month of March, 1917, at which time the said compensation was stopped, and libellant was informed that he must look elsewhere for his remedy for redress for the injuries and damages received by him; that thereafter and as speedily as possible, libellant placed the matter in the hands of attorneys, who, as libellant is informed and verily believes, did subsequently begin an action on the law side of the courts against the respondent. That from time to time thereafter, libellant's inquiries of his attorneys as to the status of the matter, were met with the statement that the case would be soon coming up for trial, until finally, and very recently, he has been informed that the case had been thrown out of court on the ground of defective service of process, and that no new process had been served because more than three years had elapsed since the occurrence of the accident and that his action was barred by limitations. That libellant has since been advised that his remedy was to be sought in the Admiralty Court, and that that Court could consider his cause, on a proper presentation of the facts, and explanation of his delay in seeking the forum of that Court. That the libellant sets forth these facts to explain the reason for the delay in bringing this action in the Admiralty Court, which court, he is informed, is the only court now having jurisdiction over this matter and in which he may obtain redress for the wrongs done him.

11th. That all and singular, the premises are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that a monition, according to the course and practise of this Honorable Court in cases of admiralty and maritime jurisdiction, may isue to the said Morse Dry Dock & Repair Company, citing and admonishing it to appear and answer this

libel, and all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the damages sustained by the libellant, with costs, and that he may have such other relief, as in law and justice, he may be entitled to receive.

FRANK GONSALVES,
ROBERT STEWART,
Proctor for Libellant.

150 Nassau St., New York City.

EASTERN DISTRICT OF NEW YORK, *ss:*

Frank Gonsalves, being duly sworn, says that he is the libellant above named; that he has read the foregoing libel, and knows the contents thereof and that same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

FRANK GONSALVES.

Sworn to before me this 10" day of Dec., 1920.
JOHN A. LEAVENS,
Notary Public, Nassau County, N. Y.

Commission expires March 20, 1921.
Certificate filed in Kings Co. Clerk's No. 73.

Endorsed: Filed December 10, 1920.

4 District Court of the United States of America, Eastern District of New York.

FRANK GONSALVES, Libellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent.

To the Honorable the Judges of the District Court of the United States for the Eastern District of New York:

The answer of Morse Dry Dock & Repair Company to the libel and complaint of the Libellant respectfully shows:

Respondent denies:

I. That it has any knowledge or information sufficient to form a belief as to each and every allegation set forth in the paragraphs of the libel designated and marked paragraphs "1st," "2d," "9th" and "10th" except that respondent admits, upon information and belief, that the libellant was employed by the respondent as a ship fitter in the work of repairing the shell plates of the steamship Starmount, while she was in dry dock, and that libellant was awarded and paid and accepted compensation by the Industrial Commission of the State of New York.

II. Upon information and belief each and every allegation contained in the paragraphs of the libel marked and designated as "3d," "4th," "5th," "6th," "7th" and "11th."

For a First Defense.

III. Respondent alleges, upon information and belief, that any injury sustained by the libellant by reason of the facts or acts alleged in said libel *were* caused by the negligence and carelessness of
5 the libellant, either in whole or in part, and was not caused by any negligence on the part of the respondent.

For a Second Defense.

IV. Respondent alleges, upon information and belief, that any negligence, fault or want of care, other than that of the libellant which caused or contributed to cause the injuries alleged in the libel, was due to the fault, want of care or carelessness of a fellow servant or fellow servants of the libellant and *were* not caused by any negligence, fault or want of care on the part of the respondent.

For a Third Defense.

V. Respondent alleges that the employment in which the libellant was engaged at the time and place set forth in the libel, involves certain risks incident thereto, which were obvious and well known to the libellant at all the times of said employment; that said risks were assumed by the libellant and that any injuries suffered by libellant arose from and were caused by the said risks, all of which were taken and assumed by the libellant at the time he entered upon said employment, and during the continuance thereof.

For a Fourth Defense.

VI. Respondent alleges that at the time of the occurrence of the alleged accident as set forth in the libel and for a long time prior thereto the respondent being engaged in one or more of the hazardous employments enumerated in the Workmen's Compensation Law of the State of New York gave security for payment of compensation to its employees and duly posted notices as required by said Workmen's Compensation Law and complied with all the provisions thereof; that libellant acquiesced therein and continued in the employment of the respondent and subjected himself to the provisions of said law, accepted periodical payments of compensation
6 thereunder and is therefore estopped from any other or further remedy and is estopped from prosecuting this libel.

For a Fifth Defense.

VII. Respondent alleges that prior to the filing of this libel the libellant and the respondent entered into a contract under the terms

and provisions of the Workmen's Compensation Law of the State of New York whereby respondent agreed to pay and the libellant agreed to accept compensation for injuries alleged to have been sustained at the time and place set forth in the libel herein at the rate of Thirteen Dollars Forty-six Cents ($13.46) per week, as provided by the Workmen's Compensation Law of the State of New York as it then existed, and the respondent paid to the libellant in periodical payments the total amount of Nine Hundred Fifty-eight Dollars Twenty-four Cents ($958.24).

For a Sixth Defense.

VIII. Respondent alleges that the libellant with full knowledge of the character of the acts of the respondent now complained of and set forth in the libel herein, and prior to the commencement of this action, accepted and retained pecuniary benefits under the provisions of the Workmen's Compensation Law of the State of New York, as it then existed at the rate of $13.46 per week, and has now received the sum of $958.24, and that the libellant has elected to pursue his remedy against respondent under the Workmen's Compensation Law of the State of New York, as it then existed.

For a Seventh Defense.

IX. Respondent alleges that on or about the 29th day of April, 1916, the libellant and respondent herein entered into a contract under the terms and provisions of the Workmen's Compensation Law of the State of New York as it then existed, wherein and
7 whereby respondent agreed to pay to the libellant and the libellant agreed to accept from the respondent compensation at the rate of Thirteen Dollars Forty-Six — ($13.46) per week as compensation for injuries alleged to have been sustained at the time and place set forth in the libel herein; and in pursuance of said agreement the respondent paid to the libellant the sum of Nine Hundred Fifty-six Dollars Twenty-four Cents ($956.24) the last installment of which was paid on the 9th day of October, 1916. That the libellant accepted said amount so paid and thereafter libellant made no effort to collect any further sum and the libellant did not demand of the respondent any further compensation reimbursement or settlement for the injuries as alleged in the libel herein; that subsequent to the date when the cause of action alleged in the libel accrued and at all times thereafter the libellant, in the exercise of reasonable care and prudence, could have commenced an action against the respondent but that he neglected so to do and allowed four years and nine months to elapse between the date of the inception of the alleged cause of action and the date of the filing of the libel herein, and the libellant herein is guilty of laches and this action is barred by reason of the Statute of Limitations in the State of New York.

For an Eighth Defense.

X. Respondent alleges that this Honorable Court is without jurisdiction of this libel.

Wherefore respondent prays that said libel be dismissed with costs.

STUART H. BENTON,
Proctor for Respondent.

Office and P. O. Address Foot of 56th Street Borough of Brooklyn City of New York.

8 STATE OF NEW YORK,
County of Kings, ss:

E. P. Morse, being duly sworn, says:
I am treasurer and general manager of the defendant. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge except as to such matters stated to be alleged upon information and belief, and as to such matters I believe it to be true. The reason this verification is made by me and not by the defendant is that the defendant is a corporation. The sources of my knowledge and the grounds of my belief are the records of the defendant, and the statements of its agents.

(Sgd.) E. P. MORSE.

Sworn to before me this 29th day of January, 1921.

(Sgd.) JOHN J. BRADY,
Notary Public, #133.

Endorsed: Filed January 31, 1921.

[Endorsed:] Filed January 31, 1921.

9 United States District Court, Eastern District of New York.

FRANK GONSALVES

against

THE MORSE DRYDOCK & REPAIR COMPANY.

Before Hon. Edwin L. Garvin, U. S. D. J.

Brooklyn, May 9, 1921.

Appearances:

Robert Stewart, Esq., for libelant;
Stuart H. Benton, Esq., (Mr. Charles J. McDermott) for respondent.

Filed July 7, 1921.

10 Mr. McDermott: The respondent takes exception to this libel, and moves to dismiss the libel on the grounds which ap-

pear upon the face of the libel itself, and which, in the opinion of the respondent denote its entire insufficiency as a matter of law. I move to dismiss the libel on the ground that it appears on the fact of the libel that the ship was in a drydock, and therefore she was not in navigable waters, and therefore the compensation law is the sole and exclusive remedy of the libelant.

(Counsel argues the motion.)

Mr. McDermott: We move to dismiss on the ground that it appears upon the fact of the libel that those injuries occurred on the 22nd day of February, 1916. That is four years and ten months ago. It is unnecessary for me to call your Honor's attention to the fact that if this were brought in common law court, in the State Court, the statute of limitation would constitute a defense. In this court there is no statute of limitations; but at the same time I recognize the general rule that these courts have adopted, a rule which is said to be analagous to the statute, and I call your Honor's attention to the allegations in this libel by which my learned friend endeavors to excuse himself from the fact which he knew would be an objection at the outset to the maintenance of this libel.

(Counsel argues motion and counsel for libelant argues
11 against it.)

The Court: For the purpose of respondent a motion to dismiss on the ground of there being another action pending, libelant's stipulation that an appeal was taken in March 1920 from the order of Mr. Justice Finch of February 15, 1920 in the action referred to in the 10th article of the libel herein, and that said appeal has never been prosecuted beyond the mere taking of the appeal——

Mr. Stewart: Then I will add that we were informed that the appeal had been abandoned. And I will make a further statement that because of the finding that no such pleading was made.

Mr. McDermott: I should like a further statement that none of that is our offer.

The Court: The motion to dismiss on the ground of laches on the part of the libelant is denied.

Mr. McDermott: Excepts.

Mr. McDermott: I renew my motion to dismiss.

The Court: I have reached the conclusion in this case that the motion made to dismiss for lack of jurisdiction is to be granted, and it is granted. I think I should also add that in view of the stipulation made in connection with the motion to dismiss on the ground that another action is pending, I believe that that motion should be granted also.

12 Mr. Stewart: Before that, your Honor, I call your attention to the fact that the State Court is not binding upon the United States Courts. Your Honor must take the statement that it is abandoned.

The Court: The Appellate Court will have to take the record and determine whether, under the statement of counsel, the Court is justified in acting on the matter as it has. The libel, therefore, is dismissed.

Mr. Stewart: Excepts.

[Endorsed:] Filed July 7, 1921.

13 At a Stated Term of the District Court of the United States for the Eastern District of New York Held at the Court Rooms, in the Federal Building, in the Borough of Brooklyn, City of New York, on the 14th Day of June, 1921.

Present: Hon. Edwin L. Garvin, District Judge.

FRANK GONSALVES, Libellant,

against

MORSE DRY DOCK & REPAIR COMPANY, Respondent.

This cause coming on to be heard on the 9th day of May, 1921, before Hon. Edwin L. Garvin, District Judge and the libellant having appeared by Robert Stewart, Esq., his proctor, and the respondent appearing by Stuart H. Benton, Esq., its proctor (Charles J. McDermott, Esq., of counsel) and the respondent having moved upon the pleadings for a dismissal of the libel and the arguments of the proctors for the libellant and the respondent having been heard and due deliberation having been given thereto, and the Court having granted the respondent motion to dismiss said action and the costs of the libellant having been taxed at Thirty-three 65/100 ($33.65) Dollars;

Now, therefore on motion of Stuart H. Benton proctor for the respondent it is hereby

Ordered that the libel herein be and the same hereby is dismissed and that the respondent recover against the libellant the sum of $33.65, the amount of said costs as taxed; and it is further

Ordered that unless an appeal be taken from this decree
14 within the time limited by the rules and practice of this Court, the stipulators for costs on the part of the libellant do cause the engagements of their said stipulations to be performed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands for the amount of their said stipulations.

(Sgd.) EDWIN L. GARVIN,
U. S. D. J.

Endorsed: Filed June 14, 1921.

[Endorsed:] Filed and entered June 14, 1921.

15 United States District Court for the Eastern District of New York.

In Admiralty.

FRANK GONSALVES, Libellant-Appellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent-Appellee.

SIRS:

Please take notice that the libellant above named hereby appeals from the final decree made and entered herein on the 14th day of June, 1921, to the Supreme Court of the United States at Washington, D. C.

Dated, New York City, July 1st, 1921.

ROBERT STEWART, Esq.,
Proctor for Libellant-Appellant.

150 Nassau Street, New York City.

To Stuart H. Benton, Esq., Proctor for Respondent-Appellee, 56th St., Brooklyn, N. Y., and Percy C. B. Gilkes, Esq., Clerk, U. S. District Court for the Eastern District of New York, Postoffice Building, Brooklyn, N. Y.

Endorsed: Filed July 1, 1921.

16 United States District Court for the Eastern District of New York.

In Admiralty.

FRANK GONSALVES, Libellant-Appellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent-Appellee.

Whereas, the above named libellant has appealed to the United States Supreme Court from the decree made and entered herein on June 14th, 1921, dismissing his libel upon the ground that the Admiralty Court has not jurisdiction of the action and such appeal has been allowed, and a bond in the sum of $250 to act as a supersedeas bond and a bond for costs on appeal, has been directed to be given;

It is hereby stipulated and consented to by the Morse Dry Dock & Repair Company, respondent-appellee, that the giving of the said bond of $250 be, and the same is hereby waived.

Dated, New York City, July 1st, 1921.

MORSE DRY DOCK & REPAIR COMPANY,
Respondent-Appellee,

(Sgd.) By STUART H. BENTON,
Proctor for Respondent-Appellee.

Endorsed: Filed July 1, 1921.

[Endorsed:] Filed July 1, 1921.

17 United States District Court for the Eastern District of New York.

In Admiralty.

No. 3074.

FRANK GONSALVES, Libellant-Appellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent-Appellee.

Assignment of Errors.

The above named libellant and appellant hereby assigns error to the decree of the District Court of the United States for the Eastern District of New York in the above named cause in the following particulars:

1st. In that it ordered, adjudged and decreed that the libel herein be dismissed for want of jurisdiction of the Court over the action.

2nd. In that it refused to accept jurisdiction of the action and to allow libellant to offer his proof as to the facts and circumstances, as alleged and set forth in the libel filed herein.

3rd. In directing the entry of the decree dismissing the libel.

4th. In that it did not deny the motion of the respondent to dismiss the libel herein, and in that it dismissed the libel herein on the libel and answer as filed.

Wherefore the appellant prays that said decree dismissing his libel herein be reversed, and that the District Court for the Eastern District of New York be ordered to take jurisdiction of the said action in admiralty.

Dated, New York City, July 1st, 1921.

ROBERT STEWART, ESQ.,
150 *Nassau St., New York City,*
Proctor for Libellant-Appellant.

Endorsed: Filed July 1, 1921.

18 United States District Court for the Eastern District of New York.

In Admiralty.

FRANK GONSALVES, Libellant-Appellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent-Appellee.

The above named libellant, Frank Gonsalves, considering himself aggrieved by the final decree rendered and entered in this cause on the 14th day of June, 1921, hereby appeals from the said decree to the Supreme Court of the United States upon the grounds and for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal herein be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that an order relating to the required security to be required of him, be made.

Dated, New York City, July 1st, 1921.

ROBERT STEWART, ESQ.,
Proctor for Libellant-Appellant.

150 Nassau Street, New York City.
Endorsed: Filed July 1, 1921.

19 Endorsed.

Appeal allowed upon giving bond in the sum of Two Hundred and fifty ($250) Dollars, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

EDWIN L. GARVIN,
United States District Judge.

20 United States District Court for the Eastern District of New York.

In Admiralty.

No. 3074.

FRANK GONSALVES, Libellant-Appellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of New York.

Certificate.

This cause came on to be heard for trial upon the facts and law, under the libel and answer filed herein.

In the libel filed herein, libellant alleges: That libellant is a citizen of the United States, and that on or about the 22nd day of February, 1916, while in the employ of the respondent as a ship-fitter and engaged in riveting the shell plates of the steamship "Starmount", which was then in the floating dry dock of the Shewan Company, Brooklyn, N. Y., he was injured by the explosion of a certain blau torch, which was being used by other employees of the respondent; and which exploded because of the defective condition of the apparatus, particularly the safety blow-off, or valve attached to the tanks used in connection therewith for the storage and mixing of the gases. That the respondent negligently failed to inspect the apparatus and ascertain and repair the defects therein, and entrusted it for use in its defective condition, to a servant unfamiliar with its use and failed to instruct him as to same, and to warn him of danger of allowing pressure to exceed certain limit. That the tank and apparatus, be-

21 cause of these acts of negligence, became overcharged and exploded, causing injuries to this libellant. That the respondent, Morse Dry Dock & Repair Company, were doing the work on board the said steamship at said time and place.

The answer, filed, denied all allegations of negligence and of the defective condition of the appliances, and all responsibility for the accident, and admitted that the libellant was in the employ of the respondent as a ship-fitter and was engaged in the work of repairing the shell plates on the steamship "Starmount" while she was in the floating dry dock, and among other defenses, alleged the payment of compensation and acceptance of the same under the Workmen's Compensation Law of the State of New York on account of said injuries received by libellant. After further setting up the defenses of contributory negligence; negligence of fellow servants; assumption of risk on the part of the libellant; that the libellant had subjected himself to the provisions of the Compensation Law of the

State of New York, accepted periodic payments of compensation thereunder, and was, therefore, estopped from any other or further remedy and is estopped thereby from prosecuting this libel; that there was paid to the libellant under the provisions of the Workmen's Compensation Law of the State of New York, compensation in the amount of $958.24, and that the libellant had elected to pursue his remedy against the respondent under the Workmen's Compensation Law of the State of New York, it was alleged, finally, as a separate defense "that this Honorable Court is without jurisdiction of this libel."

Upon the opening of said trial, the respondent at once moved to dismiss the libel upon the ground that this Court, sitting in Admiralty, has no jurisdiction of the action, and after hearing
22 argument of counsel upon said motion to dismiss for want of jurisdiction, the Court found, as a matter of law, that this Court, sitting in Admiralty, had no jurisdiction over this action, and therefore, dismissed libellant's libel, with costs, and thereafter, a decree was entered herein, dismissing the libel with costs as taxed, of $33.65 to the respondent herein.

Now, therefore, it is certified that the question of the jurisdiction of this Court over this action as set forth in the libel and answer filed herein, is the only question of law upon the pleadings and process for the decision of the Supreme Court of the United States.

Dated, July 1st, 1921.

EDWIN L. GARVIN,
United States District Judge.

Endorsed: Filed July 1, 1921.

23 United States District Court, Eastern District of New York, *ss:*

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify, that annexed hereto is a correct transcript of the record in the case of Frank Gonsalves against The Morse Dry Dock & Repair Company, made up for the purposes of appeal.

In witness whereof, I have caused the seal of the said Court to be hereunto affixed at the Borough of Brooklyn, in the Eastern District of New York, this thirteenth day of July in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of District Court of the United States, Eastern District of New York.]

PERCY G. B. GILKES,
Clerk.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Morse Dry Dock & Repair Company, respondent, in a cause in admiralty in the District Court of the United States for the Eastern District of New York entitled—

FRANK GONSALVES, Libellant,

against

MORSE DRY DOCK & REPAIR COMPANY, Respondent.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, D. C., on the 29 day of July, A. D. 1921, pursuant to an order allowing an appeal, filed and entered in the Clerk's Office of the District Court of the United States for the Eastern District of New York, from a final decree signed, filed and entered herein on the 14th day of June, 1921, in that certain suit, being in Admiralty, wherein Frank Gonsalves is libellant and appellant, and you are respondent and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing the appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Edwin L. Garvin, a Judge for the Eastern District of New York, this first day of July, 1921.

EDWIN L. GARVIN,
U. S. D. J.

25 [Endorsed:] United States District Court for the Eastern District of New York. In Admiralty. #3074. Frank Gonsalves, Libellant-Appellant, against Morse Dry Dock & Repair Co., Respondent-Appellee. 10c. pd. Citation. Robert Stewart, Proctor for Libellant-Appellant, 150 Nassau Street, New York. Service of a copy hereof is hereby admitted this 18 day of July 1921. Stuart H. Benton, by C. J. McD. Proctor for Respondent-Appellee. Filed July 1, 1921.

26 United States Supreme Court.

No. 418–1921.

FRANK GONSALVES, Libellant-Appellant,

against

MORSE DRY DOCK & REPAIR CO., Respondent-Appellee.

It is hereby stipulated between the parties hereto that the spelling of the name of the libellant and appellant be corrected in all papers constituting the record and proceedings herein by changing the last

letter from a "z" to a- "s" to correspond with the correct spelling of libellant's name.

Dated, New York City, July 20th, 1921.

ROBERT STEWART,
Proctor for Libellant-Appellant.
STUART H. BENTON,
Proctor for Respondent-Appellee.

27 [Endorsed:] United States District Court, for the Eastern District of New York. Frank Gonsalves, Libellant, against Morse Dry Dock & Repair Co., Respondent. Transcript of Record on Appeal.

Endorsed on cover: File No. 28,373. E. New York D. C. U. S. Term No. 418. Frank Gonsalves, appellant, vs. Morse Dry Dock & Repair Company. Filed July 19th, 1921. File No. 28,375.

Supreme Court of the United States

October Term, 1921.

No. [redacted]8

FRANK GONSALVES,

Appellant,

vs.

MORSE DRY DOCK & REPAIR COMPANY,

Respondent.

BRIEF OF APPELLANT

[redacted]

Proctor for Appellant.

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IN THE

United States Supreme Court

OCTOBER TERM—1921.

No. 418.

FRANK GONSALVES,
Appellant,

against

MORSE DRY DOCK & REPAIR CO.,
Respondent.

BRIEF FOR LIBELLANT-APPELLANT

Statement

This is an appeal from the District Court of the United States for the Eastern District of New York, in Admiralty, dismissing appellant's libel upon the ground that the Court was without jurisdiction in the matter.

The libel was to recover damages for personal injuries suffered by the appellant while in the employ of the respondent company, and engaged in work as shipfitter on board the steamship "Starmount" in riveting her shell plates; the steamship then lying in the floating dry dock of the Shewan Company, at Brooklyn, N. Y. Upon the opening of the trial, the respondent moved to dismiss the libel upon the ground that the

District Court, sitting in Admiralty, had no jurisdiction over this action. After hearing argument, the Court found, as a matter of law, that the Court had no jurisdiction over the action, and therefore dismissed the lible. *During the argument,* something was said concerning a former suit at law, which had been attempted to be begun in the Supreme Court of the State of New York, but which had been thrown out of that court upon the ground of defective service of process; and an appeal from the order holding that the service of process in the State Court was defective and the action not properly begun, having been taken to the Appellate Division of the Supreme Court, but which appeal was never perfected and never brought on for argument, and which had, in effect, been abandoned, though never formally disposed of. The District Court in passing upon the motion to dismiss for want of jurisdiction, also stated that upon a stipulation on behalf of the appellant that an appeal was taken in March, 1920, from the order of Mr. Justice Finch (of the New York Supreme Court), of February 15th, 1920, in the action referred to in the 10th paragraph of the libel (this order being the one setting aside the service of process in the State Court) and that said appeal never had been perfected beyond the mere taking of the appeal, that he believed the motion to dismiss for lack of jurisdiction should be granted, on that ground also. The sole question, therefore, presented upon this appeal is, "Did the United States District Court for the Eastern District of New York, sitting in Admiralty, have jurisdiction of this cause of action as set forth in the libel."

Appellant contends that it did, and urges in support of his contention.

POINT I

The cause of action set forth in the libel was that of a maritime tort, cognizable in admiralty and over which the Court had jurisdiction.

The exception to the libel, was made and sustained by the Court, on the ground, that because the ship was in a *floating* drydock, she *was not on or in navigable waters*, and that, therefore, under the decision of this Court, in *Cope vs. Vallette Dry Dock Co.* (119 U. S., 625), and the decision of the District Court for the Eastern District of New York in the "Warfield," (120 Fed., 847), *there was no maritime tort*, and the Court was without jurisdiction.

It was, and is contended by appellant that in deciding the *Cope* case (*supra*), this Court was passing solely upon a salvage question and that the decision in that case did not go to the extent claimed for it in the decision in the "Warfield" (*supra*), which was based on the Cope decision, or in the argument by respondent before, and the decision of, the District Judge in the instant case.

As counsel reads and understands the Cope decision, it means, that a floating or marine dry dock, being permamently moved and not designed for navigation, could not be the subject of salvage, and the decision does not go beyond that. It is true, that reference was made in the opinion, to the fact, that the dock, was attached to the shore, had no motive power and was not used for the carrying on of commerce in the sense of the carriage of either cargo, or passengers, but these were only set forth as reasons for the holding of

the Court that the *floating dock itself*—as *so fastened* could not be the subject of salvage. On the other hand, this Court, in the case of the "Jefferson" (215 U. S., 130, 30 Sup. Ct., 58, 54 L. Ed., 125), held that a *ship while in dry dock* undergoing repairs was subject to admiralty jurisdiction and liable for salvage service.

Appellant contends that in the case at bar, the ship being in the *floating* dry dock, undergoing repairs to her shell plates, which could not be made while she was in the water, was subject to the jurisdiction of a Court of Admiralty, and that this accident, having occurred *on board* of the ship, under those circumstances, and while libellant was engaged in that very work of repair, that the accident became, and was one over, and to which the jurisdiction of admiralty applied.

The actual *place* of the accident was *on the ship*, and while it is true, the ship *herself* was not afloat in navigable waters, nevertheless, the *dock*, in and to which she was fastened, *was afloat* in navigable waters. It is true, the dock was permanently moored, but the ship, while in that dock, was not on land. The dock *in which she rested* was water borne and it may be said, fairly, the ship was in or on navigable waters.

It is appellant's contention that under these circumstances, if the accident had been causd by the negligence of the ship, it would clearly have been a maritime tort; one which would be subject to the jurisdiction of the Admiralty Court, and that if this be correct, then the mere fact, that it was the negligence of *a third person making the repairs, on board the ship herself*—which actually caused this accident, would not be sufficient to deprive the Court of that jurisdiction.

While the ship, was not actually *in* the water, in the sense that her hull was actually in contact with the water, it is our contention that she was *on* navigable waters within the meaning of this Court, when it stated in *Atlantic Transport Co. vs. Imbrovek* (234 U. S., 52):

> "To constitute a maritime tort, it is not indispensable that there must be either an injury to a boat, or an injury by the negligence of a boat, or her owners or mariners. A Court of Admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect and produces injuries to the person or property of another on navigable waters."

The ship herself, was a maritime subject, within the admiralty jurisdiction, even while in the dock, for as was said by this Court, in the "Jefferson", 215 U. S., at page 142 (30 Sup. Ct., 58, 54 L. Ed., 125, 17 Am. Cases, 907):

> "In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject, within the admiralty jurisdiction, when for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel, if fastened to a wharf in a dry harbor, where by the natural rescission of the water by the ebbing of the tide, she, for a time, might be upon dry land."

If the "Starmount", though in the dock, had still been afloat, not yet lifted out of the water, and this accident had then occurred, it could hardly be claimed that admiralty would not have jurisdiction of the tort, exactly as if it happened while she was fast to a wharf, afloat on the flood

tide. As the tide ebbs, and the ship begins to rest on the bottom, or as in the instant case, the chambers of the dock are emptied, and the dock begins to rise, and to lift the ship out of the water, does Admiralty begin to lose jurisdiction, so that, at the moment she rests entirely on the bottom, with the water gone from around her hull, or in the instant case, the ship is lifted clear of the water, it is entirely gone, only to come into existence again as the waters of the flood tide begin to lap her hull or as the dock begins to sink, and the water to touch the ship, again?

In other words, would an accident happening, while she was still afloat be a maritime tort, and not be one, at the moment, the water ceased to surround her, and again become one, the moment the water began again to surround the hull?

It is submitted, that though locality is the test as to whether a tort is, or is not a maritime one, that here the locality was on a ship, *on* navigable waters, and the tort was a maritime one, of which the Admiralty Court had jurisdiction. The libellant, *was not on land* when he was injured; he was on the ship. Neither was the ship on land, she was in a dock, *which was afloat in navigable waters, water borne,* although fastened to the shore in such a manner that it could only move up and down, in the water, unless the supports were loosened, or removed, and, therefore, for all practical purposes *the ship herself,* though not actually *water borne* at the time of the accident *was on navigable waters.*

The services, which were being rendered by libellant at the time his injury was received, were maritime.

Peyroux vs. Howard, 7 Pet., 324.
The Robert W. Parsons, 191 U. S., 17.
The Jefferson (supra).

They were being performed on board a ship upon navigable waters, and the injury falls within the jurisdiction of admiralty.

POINT II

There was no plea by respondent, in abatement, because of the pendency of any action or proceeding in the state court, and none could be made on that ground.

No reference to any pending appeal in the State Courts will be found in either the libel or the answer. It was only during the argument on the motion to dismiss on the ground of laches, that the statement was made by the advocate for respondent, that an appeal had been taken, and never prosecuted or determined. The mere pendency of another action for the same cause and between the same parties in the State Court, however, could not deprive the District Court of jurisdiction, either in admiralty or at common law:

> "It is well settled that pendency of another action for the same cause in the United States Courts is not available as a defense, in the State Courts, or *vice versa.*"
>
> *Oneida County Bank vs. Bonney,* 101 N. Y., 173.
> *Stanton vs. Embrey,* 93 U. S., 548, 23 L. Ed., 983.
> *Gordon vs. Gilfoil,* 99 U. S., 168, 25 L. Ed., 383.

The pendency of a prior suit in a State Court is not a bar to a suit in a Federal Court by the plaintiff against the same defendant for the same cause of action.

Stanton et al. vs. Embrey Administrators, 93 U. S., 548, 23 L. Ed., 983.
Insurance Co. vs. Brunes' Assignee, 96 U. S., 588.

There was, therefore, no bar to the jurisdiction of the Admiralty Court, over this action, because of the pendency of any prior action or appeal in the State Court, and this even if such plea had been made in its answer by respondents, which, however, was not done.

The only question, therefore, which is involved in this appeal is, whether or not, the tort complained of in the libel, was of such a maritime nature, that the Admiralty Court should have assumed jurisdiction and heard libellant's proofs.

Appellant respectfully submits, that the Admiralty Court did have jurisdiction over the cause and should have exercised it, and prays that his appeal herein be sustained, with costs, and the case remanded to the District Court for the Eastern District of New York, for trial on the merits.

Respectfully submitted,

ROBERT STEWART,
Proctor for Libellant-Appellant,
Frank Gonsalves,
150 Nassau Street,
City of New York,
State of New York.

IN THE

Supreme Court of the United States

October Term 1921.

No. [redacted]

FRANK GONSALVES,

Appellant,

vs.

MORSE DRY DOCK & REPAIR COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

CHARLES J. McDERMOTT,
Proctor for Respondent.
2 Rector Street,
New York City, N. Y.

CHARLES J. McDERMOTT,
CULLEN & DYKMAN,
ARTHUR E. GODDARD,
HENRY C. HUNTER,
of Counsel.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

IN THE

Supreme Court of the United States

October Term [illegible]

No. [illegible]

[illegible]

Appellant,

v.

[illegible]

Respondent.

IN THE

Supreme Court of the United States

October Term 1921.

No. 418.

October Term 1922, No. 125.

FRANK GONSALVES,
Appellant,

vs.

MORSE DRY DOCK & REPAIR COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Statement.

The libellant appeals to this Court from the dismissal of the libel by the District Court of the United States for the Eastern District of New York.

The libel was dismissed for lack of jurisdiction (fol. 12, page 8).

The libel alleges that the libellant is a ship fitter, a resident of the State of New York. He was em-

ployed by respondent, a (domestic) New York corporation. Libellant seeks to recover damages for personal injuries alleged to have been suffered by him while engaged in his employment on board S. S. "Starmount" on or about February 22nd, 1916, while that vessel was in the dry dock of a third concern, the Shewan Company, at the foot of 27th Street, Brooklyn, New York.

It is not specifically alleged that the vessel itself nor the dry dock was in navigable waters. The allegation is that the said respondent had charge of the work of repairing shell plates of the steamship "Starmount," which was then in the floating dry dock of the Shewan Company at the foot of 27th Street, Brooklyn, N. Y. That libellant was working for the respondent on board the said steamship in the work of making said repairs.

It appears in the record, that prior to the filing of this libel, libellant accepted the provisions of the Workmen's Compensation Law of the State of New York (libel, par. 10, page 3) and was awarded $13.46 per week and was paid such compensation until March, 1917, amounting to $956.42 (7, page 96) and he also instituted, or attempted to institute, an action in the Supreme Court of the State of New York to recover his damages at law.

He filed this libel Dec. 10, 1920, four years and nine months after the injury. By section 383 of the Code of Civil Procedure of the State of New York, as then existing, an action in a State Court, to recover damages for personal injuries resulting from negligence, must be commenced within three years.

POINT I.

The Court was without jurisdiction. There is no reason for denying the jurisdiction of the State Industrial Commission. The Workmen's Compensation Law abrogates the right of recovery.

The Workmen's Compensation Law of the State of New York in its main features has been held to be constitutional.

N. Y. C. R. R. Co. vs. *White,* 243 U. S., 188.
Mountain Timber Co. vs. *Washington,* 243 U. S., 219.

As we understand the latest decisions of this Court, interpreting,

Southern Pacific Co. vs. *Jensen,* 244 U. S., 205,
Knickerbocker Ice Co. vs. *Stewart,* 253 U. S., 156,

the Workmen's Compensation Law of this State, prescribing an exclusive remedy in case of injury to employees, has been declared unconstitutional by this Court *only to that extent which* contravenes the essential purposes expressed by the act of Congress, or works material prejudice to the charteristic features, of the general maritime law, or interferes with the proper harmony and uniformity of that law, in either international or interstate re-

lations. That as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter may be modified or supplemented by State Statutes. That, while the cause may be of a kind ordinarily within the admiralty jurisdiction, yet when the general employment contracted for and the workman's activites at the time, do *not* have any direct relation to navigation or commerce, but are local matters, then regulation of the rights, obligations and consequent liabilities of the parties as between themselves, by a local rule (the Workmen's Compensation Act) does not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. That under such circumstances the exclusive features of the State Workmen's Compensation Acts apply, and abrogate the right to recover damages in an admiralty court which would otherwise exist.

Western Fuel Co. vs. *Garcia,* 66 Sup. Ct. Rep. (Lawyers' Edition), 97;
Grant Smith Porter Co. vs. *Rhode,* 66 Sup. Ct. Rep. (Lawyers' Edition), 172;
State Industrial Commission vs. *Nordenholt Corp.,* 66 Sup. Ct. Rep. (Lawyers' Edition), 567.

We contend that this case comes directly within that principle and is governed by the expression of opinion of this Court in Grant Smith Porter Co. vs. Rhode, *supra,* as reiterated in the Insana (State Industrial Commission vs. Nordenholt) case.

There is a wide distinction between the character of *employments*, and the employments themselves, enumerated in group 8 and group 9 of the Workmen's Compensation Law of the State of New York. One relates to employees of the vessel or its owners; the other to local employees. Group 8 relates to the *operation* (including repairs) of vessels when operated or repaired *by the company*, while group 9 refers to "Ship building *including* the construction and repair of vessels in a ship yard."

Libellant in the case at bar lived in the State of New York, was employed by a domestic contracting corporation which would be guilty of a misdemeanor for non-compliance with the Workmen's Compensation Law.

People vs. *Donnelly*, 232 N. Y., 423.

He was not employed by a vessel or vessel owner, nor by "the Company" owning or operating the vessel, nor engaged in an occupation of a kind which required him to be "subjected to the laws of one jurisdiction today and another tomorrow," his "general employment" was not of a maritime nature—it was local in character—the mere fact that he happened at the time of his injury to be employed in work being done under a maritime contract is not the determining factor.

POINT II.

The exception to the libel for want of jurisdiction was properly upheld on another ground. It is not specifically alleged that the vessel, nor the dry dock in which the vessel was situated, was in navigable waters.

The decision of this Court in the "Insana" case, State Industrial Commission vs. Nordenholt, 66 Sup. Ct. Rep. (Lawyers' Edition), 567, leaves no further question as to the liability where the injury happens on a *dock*. It is contended that the "Starmount" was in navigable wates because of the decision in *The Jefferson*, 215 U. S., 142. This case is an authority for the simple proposition which we do not dispute that the *vessel* remains a "maritime subject" while in dry dock for repairs, *"for the purpose of passing upon claims for salvage services"* (page 143).

As has been said by this Court "the vessel itself was unimportant."

> *Atlantic Transport Co.* vs. *Imbrovek*, 234 U. S., 52 at 59.

Of course the distinction between jurisdiction of Courts of admiralty in contract and tort cases is too well understood to be more than casually referred to.

We are not interested here in dealing with the liability of the ship, as a responsible cause for this injury.

It was held by this Court in *Cope* vs. *Vallette Dry Dock Co.*, 119 U. S., 625, that a dry dock was

not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water.

In the *Robert W. Parsons,* 191 U. S., 17, Mr. Justice Brewer said:

> *"That a dry dock is to be considered as land* in the maritime law seems to be clear from the decision of this Court in Cope vs. Vallette Dry Dock Co., 119 U. S., 625, 7 Sup. Ct., 336, 30 L. Ed., 501."

See also

Ruddiman vs. *A Scow Platform,* 38 Fed., 158 and
Patton Tully Co. vs. *Turner,* 269 Fed., 334-337.

Under the Statutes of the State of New York a "dry dock" is a "terminal facility" (Ch., 154 L., 1921, Art. XXII), and is subject to the right of purchase by the port authorities.

The very question here involved has been passed upon by Thomas, District Judge, in the Eastern District of New York, from which District this appeal is taken.

The Warfield, 120 Fed. Rep., 847.

In this case the employee of the contractor was injured on the S. S. "Warfield," then in dry dock for repairs. Cited in *The Dredge A,* 217 Fed., 617.

In *Berton* vs. *Tietjen & Lang Dry Dock Co.,* 219 Fed., 763, the injury occurred while in defendant's employment and working upon a vessel in dry dock, the Court discussed the question at length, and the opinion upholds our contention.

Finally.

There is no pertinent Federal Statute. Application of the local law will not work material prejudice to any characteristic feature of the maritime law. The appellant's general employment was not maritime. The injury happened on land in the State of New York. The exclusive remedy is the Workmen's Compensation Law, of the provisions of which this libellant availed himself prior to filing this libel, thus indicating that the parties themselves believed they had contracted with reference to the State Statute (Record, page 3, par. 10th, libel). Libellant certainly did not *then* construe his "general employment" as maritime. He accepted the provisions and benefits of the "local law" and can still enforce his award of compensation through the State Courts. His right of *action* however is barred by the State Statute (Section 383, Code Civil Procedure).

The decree of the District Court should be affirmed.

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